UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

NORTH AMERICAN PIPE CORPORATION
Employer

and

FORREST CAPLE, An Individual **Case 26-RD-1107**
Petitioner

and

UNITE HERE, AFL-CIO, CLC
Union

DECISION AND ORDER

I. INTRODUCTION

This case involves whether there is a causal relationship between alleged unfair labor practices and employee disaffection supporting a petition seeking to decertify UNITE HERE, AFL-CIO, CLC as the collective-bargaining representative of a unit of production and maintenance employees and truck drivers at the Employer's Van Buren, Arkansas facility. Forrest Caple filed the petition on August 23, 2004.

On November 30, 2004, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued in Cases 26-CA-21733 and 26-CA-21833 alleging that the Employer violated Section 8(a)(1) and (5) of the Act by conduct including prohibiting off-duty employees from distributing union literature on the company parking lot in June 2004 and by awarding 100 shares of stock on August 16, 2004 to bargaining unit employees without notice to or bargaining with the Union.

On January 11, 2005, Case 26-RD-1107 was consolidated with Cases 26-CA-21773 and 26-CA-21833 for the purpose of conducting an evidentiary hearing in accordance with the Board's decision in *Saint Gobain Abrasives, Inc*., 342 NLRB No. 39 (2004) to determine if a causal relationship existed between employee disaffection reflected in the filing of the decertification petition and the unfair labor practices alleged in the complaint. Following the close of the hearing, the administrative law judge remanded Case 26-RD-1107 to me. The Employer and Union filed briefs with me addressing the causation issue.

On March 29, 2005, Administrative Law Judge Margaret Brakebusch issued her Decision and Recommended Order in Cases 26-CA-21733 and 26-CA-21833. She found that Respondent violated Section 8(a)(1) as alleged in the complaint but concluded that the Employer did not violate Section 8(a)(5) of the Act because she found the stock award was a gift. Alternatively, she concluded that if the stock award was not a gift, the Union waived its right to bargain over the grant of the award. I respectfully disagree with the judge's findings and conclusions that the stock award was a gift and that the Union waived its right to bargain over the grant of the award. Accordingly, I directed that exceptions be filed to the judge's failure to find that Respondent violated the Act as alleged in the complaint.[1]

I have carefully considered the evidence adduced during the hearing, the arguments advanced by the parties. At hearing and in its brief to me, the Employer contended that the petition should not be dismissed because there is no causal relationship between the alleged unfair labor practices and employee disaffection and because the employee

[1] Those exceptions were filed on May 9, 2005.

disaffection reflected in this petition is a continuation of earlier employee disaffection evidenced by a decertification petition filed on December 31, 2003. Conversely, the Union urges that the petition should be dismissed because the alleged unfair labor practices were a cause of employee disaffection.

Applying the causation test set forth in *Master Slack*, 271 NLRB 78, 84 (1984), I have concluded that there is insufficient evidence of a casual relationship between the conduct alleged to be violative of Section 8(a)(1) of the Act. However, I am dismissing the petition because I have found there is sufficient evidence of a causal relationship between Respondent's unilateral grant of the 100 shares of stock and the employee disaffection reflected in the filing of the petition in this case. In reaching this conclusion, I have considered among other things, the close temporal proximity between the Employer's allegedly unlawful conduct and the collection of signatures on the showing of interest for the decertification petition, as well as the tendency of the Employer's conduct to have a lasting negative effect on employees, thus causing disaffection from the Union.

To provide a context for my decision I will first discuss the relevant facts and then will analyze whether the evidence establishes that a causal relationship exists between employee disaffection and the 8(a)(1) conduct the judge found to be unlawful or between employee disaffection and the alleged unlawful grant of the stock award.

II. STATEMENT OF FACTS

As described in more detail below, the Union has represented a unit of the Employer's employees since 2001. A decertification petition was filed on December 31, 2003, but was withdrawn in January 2004. Thereafter, the Union engaged in activities to communicate with employees about contract negotiations and Union membership. On two

occasions in June 2004, the Employer prohibited an employee from handbilling for the Union in the Employer's parking lot. On August 16, the Employer unilaterally issued 100 shares of stock to almost every unit employee. On August 23, the decertification petition in this matter was filed.

A. Overview of Operations and Bargaining History

The Employer is headquartered in Houston, Texas and operates several manufacturing plants in the United States, including one in Van Buren, Arkansas where it manufactures polyvinyl chloride piping products. The plant manager at the Van Buren facility is Danny Ming.

Since about 2001, the Union has been the collective-bargaining representative of a unit of production and maintenance employees and truck drivers at the Van Buren facility. In August 2004, there were about 48 employees in the unit.[2] At the time of the January 2005 hearing, the bargaining unit had grown to approximately 56 employees.

The most recent collective-bargaining agreement covering the unit was effective by its terms from November 20, 2001 to October 31, 2003. The agreement also provided that it would be effective from year to year after October 31, 2003 unless either party gave 60-days written notice of a desire to modify or terminate the agreement. Because neither party provided such timely notice, the agreement became effective for another year without modification. As a result, unit employees received no wage increase in 2003.

[2] The petition in Case 26-RD-1107 indicates that there were about 50 employees in the unit. I take administrative notice that a list of unit employees provided by the Employer for the payroll period ending August 23, 2004, contains 48 names.

B. The First Decertification Petition

On December 31, 2003, unit employee Michael Gray filed the petition in Case 26-RD-1097 seeking to decertify the Union. Gray testified he filed the petition because some employees were unhappy with the way the Union was handling things. By letter dated January 9, 2004, the parties were requested to submit evidence to the Region regarding whether there was a contract bar that would preclude processing that petition. I take administrative notice that the petition in that matter was withdrawn on January 26, 2004.

C. The Union's Activities After Withdrawal of the Petition

After the withdrawal of the decertification petition in Case 26-RD-1097, the Union engaged in activities to communicate with employees regarding contract negotiations and Union membership. Between late May and the end of July 2004, Local Union President Steve Tabor and employee Richard McMullin obtained signatures of 21 unit employees on a petition demanding a pay raise. Tabor obtained approximately 19 of the signatures in union meetings and in house calls made with Union Representative Ray McKinney. Five of the employees who signed this petition were not union members. Tabor explained that he intended to present the petition to the Employer when the parties began bargaining over economics in contract negotiations.

Between June 1 and July 13, the Union obtained five signed authorization cards from employees. Two of those employees had been employed for over three years. The other three were relatively new employees.

In addition to trying to reach employees through house calls and union meetings, the Union also attempted to distribute leaflets to employees on the Employer's parking lot. These leaflets dealt with getting a raise and a survey of what the Union should seek in

contract negotiations with the Employer. On June 23 and 30, 2004, the Employer prohibited an off-duty employee from distributing union literature on the company parking lot.

D. Alleged Unfair Labor Practices

1. Allegations Regarding Employee Solicitation and Distribution

On June 23, off-duty employee Steve Tabor and Union officials Ray McKinney and Daleva Sullentrup attempted to distribute surveys and other union literature to employees on the Employer's parking lot as employees entered and exited the plant. This was the first day that the Union had attempted to handbill on the parking lot. It is undisputed that Plant Manager Danny Ming instructed them to leave the company parking lot.

On about June 25, Ming posted a memorandum in the employee breakroom regarding "Recent Union Activities." The memorandum referenced the Union's recent efforts to distribute material to employees and informed employees that the Employer's solicitation policy protected employees "from being confronted by anyone and asked to accept literature and/or participate in any non-work related endeavor." The memorandum also responded to some of the materials the Union distributed. Specifically, in response to the Union's claim that the Employer said employees did not need a raise, the memorandum asserted that it was not the Employer's fault that the contract had not reopened; the Employer claimed that the Union had forgotten about employees. The memorandum also noted that the Union was trying to distribute authorization cards to collect dues from employees' paychecks and stated that employees did not need to sign that form unless they "really wanted to pay the Union for whatever service they were providing" to the

employee. The memorandum concluded by telling employees they could contact Plant Manager Ming directly if they had any questions or concerns regarding the issues in the memorandum.

On June 30, employee Tabor was handbilling alone on the Employer's parking lot when Ming approached Tabor while Tabor was talking with employee Scott. Approximately four other employees were in the immediate area. Ming ordered Tabor to take his solicitation to the sidewalk. At hearing, Ming admitted that he threatened to call the police when he ordered off-duty employees to leave the company parking lot.

Tabor filed a grievance on July 14 protesting the Employer's denial of access to the parking lot for the purpose of distributing Union literature. On July 16, Ming responded to Tabor's grievance. In denying the grievance, Ming relied upon a Van Buren Plant Rule that prohibited the soliciting of or by employees for the sale of any item or collecting funds without written authorization from the plant manager. He also relied upon a corporate rule that prohibited solicitation on company premises without authority or during regular work hours. Ming also referenced a corporate rule that specifically prohibited "starting or nurturing false, malicious rumors or information about fellow workers, the company or its products". Ming acknowledged that the only time this rule had been applied was in the context of his response to Tabor's grievance.

2. The Stock Award

By memorandum dated August 16, unit employees were notified that the Employer was awarding 100 shares of stock to all full-time regular employees with at least six months of service. Corporate Human Resources Manager Steven Edwards testified that this memorandum was sent to all facilities on either August 15 or 16. He further testified

that management at the Van Buren facility was instructed to post the memorandum immediately and it was his understanding that management complied with those instructions.

In addition to the posted memorandum, the Employer gave each employee a letter informing them of the stock award. Human Resources Manager Keith Johnson acknowledged that he delivered the employee letters and the stock certificates to the Van Buren facility on August 17 or 18. Johnson admitted that he had conversations with about 20 unit employees during this visit and that the subject of a wage increase and the stock award came up with most of the employees. Johnson also testified that most employees were excited about the stock award. One employee testified that in a 20 to 30 minute conversation, Johnson told the employee that Johnson was over 11 plants and that the Van Buren plant had been the only plant not to get a raise. Johnson also told the employee that they could not give the Van Buren employees more of a raise than other plants because it would influence other plants to want to have a union.[3] Johnson claimed that he told that employee and others that he did not know if they would receive a wage increase this year as that depended on whether the Union opened negotiations.

It is undisputed that the Employer failed to notify or bargain with the Union prior to making its announcement and granting the stock to unit employees. Similarly, it is undisputed that each unit employee with at least 6 months seniority, 45 of the 48 unit employees, received the stock award. At the time of issuance, the stock had a value of

[3] Johnson confirmed that he spoke with this employee, but did not specifically deny making these statements.

approximately $14.50 per share. At the time of the hearing, the stock had a value of approximately $30 per share.

E. The Current Decertification Petition

On August 23, 2004, Forrest Caple filed the decertification petition in this case. His petition was supported by signatures collected between August 16 and 20. More specifically, 72 percent of those signatures were obtained on or after August 18.[4] There is a commonality of signatures of employees on the showings of interest submitted in support of the current petition and the petition filed in 26-RD-1097, which employees represent at least 30 percent of the unit.

III. ANALYSIS

The Board generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the petition itself. The Board considers conduct that taints the showing of interest, precludes a question concerning representation, or taints an incumbent union's subsequent loss of majority support to be inconsistent with the petition. To determine whether a causal relationship exists between unfair labor practices and the subsequent expression of employee disaffection with an incumbent union, the Board has identified the following relevant factors: (1) the length of time between the unfair labor practices and the filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee

[4] I take administrative notice of this percentage based on my examination of the showing of interest.

morale, organizational activities, and membership in the union. *Overnite Transportation, Co.*, 333 NLRB 1392, 1392-1393 (2001) citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984). See also *Saint Gobain Abrasives*, supra. I will apply these factors to the allegations regarding employee solicitation and distribution and also to the allegations that the stock award is violative of Section 8(a)(5) of the Act.

A. Allegations Regarding Employee Solicitation and Distribution

The judge found that the Employer violated 8(a)(1) of the Act by: (1) maintaining, giving effect to, and enforcing an overly broad no solicitation rule prohibiting solicitation on company premises without authority or during regular work hours; (2) selectively and disparately enforcing a facially valid employee rule; and (3) prohibiting employees from distributing Union literature to other employees on Respondent's parking lot. While the judge found this conduct to be unlawful, I find that the evidence fails to establish a causal relationship between that conduct and the subsequent expression of employee disaffection with the Union.

Regarding the first causation factor, the length of time between the unlawful conduct and the filing of the petition, the evidence establishes that the unlawful no solicitation policy had been maintained for years prior to the filing of the petition. The prohibition on employee handbilling in the parking lot first occurred two months before the petition was filed. Finally, the Employer selectively and disparately applied its false rumors rule approximately one month before the filing of the petition.

Regarding the second and third factors, the nature of the illegal acts including the possibility of their detrimental or lasting effect on employees and any possible tendency to cause employee disaffection from the union, I find that none of the conduct relating to

employee solicitation and distribution was of an egregious nature such that it would have a detrimental or lasting effect on employees. In this regard, it is unclear from the record how many employees witnessed or were actually aware of any of the conduct.[5] While prohibiting employees from engaging in lawful handbilling in the parking lot and posting a notice indicating that the handbilling was in violation of the Employer's solicitation policy could have a detrimental effect on employees' views of the Union and could weaken the Union's efforts in communicating to employees, the evidence fails to establish that occurred. Rather, the evidence establishes that notwithstanding the Employer's unlawful conduct, the Union was able to obtain signatures from at least 21 employees on a petition in support of a pay raise. Five of the employees who signed the petition were non-members. The evidence establishes that the signatures were collected at various times before and after the Employer's conduct that is violative of Section 8(a)(1) of the Act.

Finally, with respect to the fourth factor, the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union, while the prohibition had a direct impact on organizational activities because the Union was forced to move to the sidewalk to handbill making it more difficult to distribute its literature and gather employee support, the evidence fails to establish what, if any, effect the Employer's conduct had on employee morale or on membership in the Union. Although the Employer's prohibition against handbilling on the parking lot could have undermined the Union's strength in the eyes of the employees, the evidence establishes that at least 21 employees had enough confidence in the Union to support its petition for a pay raise.

[5] At best, the record establishes that five employees were in the immediate area on June 30, when Plant Manager Ming ordered Tabor off the parking lot.

Notwithstanding any impact the Employer's conduct may have had on the Union's organizational activities, I find that under the circumstances the evidence falls short of establishing that the *Master Slack* causation test has been satisfied as it relates to the Employer's unlawful 8(a)(1) conduct.

B. The Stock Award

I turn now to applying the causation factors to the alleged unilateral grant of the stock award. Regarding the first factor, the length of time between the unlawful conduct and the filing of the petition, I note that the time between the alleged unlawful grant of the stock award and the filing of the petition is brief. Thus, the stock award was announced the same day the first signature was obtained on the showing of interest for the petition. Even more significant is the fact that 72 percent of the signatures supporting the showing of interest were obtained on the same day or within two days after the Employer's distribution of letters to employees notifying them about the stock.[6] See *Jano Graphics, Inc.*, 339 NLRB 251 (2003) (Board found tainted a showing of interest circulated one day after the employer's announcement that unlawful unilateral changes had been implemented.) Accordingly, I find that the first causation factor is satisfied.

Regarding the second factor, the nature of the illegal acts including the possibility of their detrimental or lasting effect on employees, I find that granting stock worth $1450 to almost every member of the bargaining unit without notice or bargaining with the Union is the type of conduct that would have a lasting effect on employees. That finding is consistent with Johnson's acknowledgement that employees were excited about the stock award when he spoke with them.

[6] Employee Tabor specifically recalled that the letters were distributed on August 18.

Concerning the third factor, any possible tendency to cause employee disaffection from the union, I find that the unilateral grant of the stock award, a significant benefit, had a significant tendency to cause disaffection from the Union because it was granted without consultation with the Union and it suggested the Union was ineffectual. This is especially true where as here, the evidence establishes that during conversations with unit employees, the Human Resources Manager told employees that the Van Buren plant was the only facility to not receive a raise and that the Employer could not give employees at the Van Buren facility a higher raise than the other facilities because it would influence those facilities to want to have a union. These statements were made simultaneously with the issuance of the award and during the time that the Union was trying to build support for contract negotiations. I find that the Employer's actions communicated to employees that the Union was not needed in order to address their key concerns. See *Penn Tank Lines, Inc.* 336 NLRB 1066, 1067 (2001) (Board noted that where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear.)

Finally, as to the fourth factor, the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union, the record does not establish whether there was any such impact.

In light of my findings that three of the causation test factors have been met, I conclude that the evidence establishes that a causal relationship exists between the Employer's unilateral grant of the stock award and employee disaffection and that the petition should be dismissed.

In arguing the petition should not be dismissed, the Employer contends that there is no causal relationship between the alleged unlawful conduct and employee disaffection and also that the employee disaffection evidenced by the filing of the petition in this case is merely a continuation of the earlier employee disaffection reflected in Case 26-RD-1097.

To support its contention that there is no causal relationship, the Employer relies on *Lexus of Concord*, 343 NLRB No. 94 (2004). However, I find the facts here are distinguishable from those in *Lexus of Concord*. Here, there is no evidence that either decertification petition was supported by an "overwhelming majority" of employees. Moreover, the stock award was an unprecedented benefit valued at $1450 that was granted to almost the entire bargaining unit at a time when the Employer was suggesting that the Union had forgotten about employees and that was the reason employees had not received a wage increase. The Employer's August 16 memorandum to employees regarding the stock award clearly states that the Employer's Board of Directors authorized the award. While the stock awards were being distributed, the Employer's corporate human resource manager personally spoke with 20 employees and discussed whether they would receive a wage increase this year. He testified that he told them he did not know; it depended on whether the Union opened negotiations. In the June 24 memorandum to employees from Plant Manager Ming regarding recent Union activities, Ming claimed that the Union had forgotten about the employees. In essence, the Employer was disbursing a benefit worth $1450 while simultaneously attributing the absence of a raise to the Union. This is in sharp contrast to *Lexus of Concord* where the Board rejected the claim that the signatures of 21 of 22 unit employees were tainted by a single unfair labor practice, the unilateral transfer of one employee into an installer position.

In arguing that employee disaffection supporting this petition is merely a continuation of the earlier employee disaffection, the Employer relies on the showing of interest provided in support of Case 26-RD-1097, filed 7½ months earlier, and asserts that disaffection was not affected by any intervening events. I reject that argument for two reasons.

First, although a new petition to decertify the Union could have been filed as early as August 3, it was not filed until August 23 and was supported by signatures obtained between August 16 and 20, the same time as the stock award announcement and distribution. Arguably, if employee disaffection from 2003 remained, solicitation for signatures would have occurred prior to any unlawful conduct and the petition would have been filed on August 3 rather than almost 3 weeks later. In addition, I note that the Board has found that showings of interest that are more than 7 months old are stale, especially where there is a showing of changed circumstances. See *Hospital Metropolitano*, 334 NLRB 555 (2001); *Rock-Tenn Co.*, 315 NLRB 670 (1994), enfd. 69 F.3d 803 (7th Cir. 1995).

Second, I find there were two intervening events — the stock award and the Union's activities to bolster support and membership — that preclude relying on the earlier showing of interest. Specifically, the stock award announcement was made on August 16 and the stock awards were distributed to employees on August 18. Thus, the timing of the stock award and the date of the signatures supporting the August 23 petition lead to the conclusion that the stock award was unequivocally intertwined with employee disaffection and caused unit employees to sign the showing of interest for the decertification petition. As for the intervening activities of the Union, I note that the Union solicited authorization

cards from 5 employees and obtained support from 21 employees when it circulated a petition for a raise. Thus, the evidence establishes that prior to the stock award, the Union's efforts to win employee support were at least somewhat successful.

In these circumstances, especially considering the 7½ months since the filing of the previous petition and the Union's intervening activity, I find that the disaffection represented in the current showing of interest was not merely a continuation of prior disaffection. Instead, I have found that there is evidence of a causal relationship between the alleged unlawful grant of the stock award and the filing of the decertification petition in this matter and I will dismiss the petition on that basis.

As noted above, I disagree with the judge's conclusion that Respondent did not violate Section 8(a)(5) of the Act and exceptions have been filed to that portion of the judge's decision. If the Board ultimately adopts the judge's finding that Respondent's unilateral grant of the stock award did not violate Section 8(a)(5), the petition is subject to reinstatement upon request in light of my finding that the evidence fails to establish that a causal relationship exists between the unlawful 8(a)(1) conduct and employee disaffection.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find:

1. The rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act because a causal relationship exists between the Employer's conduct alleged in the complaint to violate Section 8(a)(5) of the Act and the employee disaffection reflected in the filing of the petition in this case.

V. ORDER

IT IS ORDERED that the petition in this matter is dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board addressed to the Executive Secretary, 1099 14th Street, N. W., Washington, D. C. 20570-0001. The Board in Washington must receive this request by **May 25, 2005**. The request may **not** be filed by facsimile. However, if the request meets certain requirements, it may be filed electronically. In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file a request for review electronically, the party should refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

DATED at Memphis, Tennessee, this 11th day of May 2005.

/S/[Ronald K. Hooks]

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